IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 09.07.2007

CORAM

THE HON'BLE MR.A.P.SHAH, CHIEF JUSTICE
and
THE HON'BLE MR.JUSTICE P.JYOTHIMANI

O.S.A.Nos.141 & 142 of 2007
&
M.P.Nos.1+1 of 2007

Sreyas Sripal ..Appellant in O.S.A.No.141/2007/2nd defendant

T.P.Anand ..Appellant in O.S.A.No.142/2007/3rd defendant

Vs.

M/s.Upasana Finance Ltd.,
98A, Dr.Radhakrishnan Salai,
Mylapore, Chennai - 600 004.
..Respondent in both the O.S.As/Plaintiff

Appeals filed to set aside the order dated 09.06.2007 passed in Appln.Nos.2284 and 2286 of 2006 in application Nos.2109 and 2110 of 2006 in E.P.Nos.193 and 194 of 2000 in C.S.No.704 of 1998 on the file of this Court.

For Appellants :: Mr.R.Yashodvardhan, Senior Counsel
For Mr.AV.K.Ezhilmani

For Respondent :: Mr.B.T.Seshadri,

J U D G M E N T

(Judgment of the Court was delivered by The Hon'ble The Chief Justice)

Admit. Learned counsel appearing for the respondents waives service. By consent, the appeals are taken up for hearing.

2. These appeals are directed against a common order passed by the learned single Judge dismissing Application Nos.2284, 2285, 2286 and 2287 of 2006 in Execution Petitions Nos.193 and 194 of 2006. The facts giving rise to these appeals may be briefly stated as follows:

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The appellants are the judgment debtors/original defendant Nos.2 and 3. The respondent/decree holder filed a suit in C.S.No.704 of 1998 and a decree was passed by this Court on 30.01.1999 in terms of a Memorandum of Compromise signed by all the parties. Under the compromise, defendant Nos.1 to 3, 5 and 6 were to pay to the plaintiff a sum of Rs.95,37, 103/- with further interest @ 33% per annum at monthly rests from the date of compromise i.e., 04.01.1999 till the date of payment. Further, the defendants were permitted to pay the amounts decreed along with interest @33% at monthly rests in 78 weekly installments commencing from 08.01.1999 and ending 30.06.2000 and if there being any delay in payment of the installments, it shall carry interest @ 36% per annum at monthly rests from the due date till the date of payment of the installments. Further if the defendants fail to pay any three consecutive installments on the due dates, the plaintiff shall be at liberty to execute the decree for the entire amount and that would become payable irrespective of the period fixed for the payment of the decree amount. As default was committed, the decree holder filed Execution Petitions Nos.193 and 194 of 2000 against the respective appellants. An order of arrest was passed by the Master on 07.11.2001 against both the appellants. According to the appellants it came to their knowledge only on 26.06.2006, as during the interregnum period, the appellants were discussing with the decree holder to arrive at a settlement, that too, without even knowing that the order of arrest was already passed on 07.11.2001. Immediately, they filed applications to recall the order of arrest, but the Master passed a conditional order to keep the warrant of arrest pending by directing the judgment debtors i.e., appellants to pay a sum of Rs.10,00,000/- on or before 15.07.2006. Aggrieved by the order of the Master dated 03.07.2006, Application Nos.2284 and 2286 of 2006 were filed by the respective appellants and Application Nos.2285 and 2287 of 2006 were filed for stay of the execution proceedings pending disposal of the applications. Learned single Judge, by the impugned order dated 09.06.2007, dismissed all the applications. Aggrieved by the order of the learned single Judge, these two separate appeals are filed by the appellants.

3. Mr.B.T.Seshadri, learned Senior Counsel appearing for the respondent-decree holder raised a preliminary objection to the maintainability of the appeals. Learned Senior Counsel submitted that the appeals are not maintainable, in view of the clear bar created by the amended provisions of Section 100A of the Code of Civil Procedure. He submitted that Section 100A of the Code of Civil Procedure provides that notwithstanding anything contained in any Letters Patent or in any instrument having the force of law or in any other law for the time being in force, where any appeal from an order or decree is heard and decided by a single Judge of a High Court, no further appeal shall lie from the judgment and decree of such single Judge. According to the him, the appellants filed appeals under Order XIV Rule 12 of the Madras High Court Original Side Rules (hereinafter referred to as 'O.S.Rules') which were numbered as applications as per practice, and against the order passed by the learned single Judge in the said appeals, no further appeal would lie in view of the express bar contained in Section 100A of the Code of Civil Procedure.

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4. On the other hand, Mr.R.Yashodvardhan, learned Senior Counsel appearing for the appellants submitted that the bar under Section 100A of the Code of Civil Procedure has no application to the present appeals. Learned Senior Counsel contended that by virtue of the Madras High Court Original Side Rules read with Section 128(2)(i) of the Civil Procedure Code, the power of the Court is delegated to the Master in respect of certain matters including the execution of the decrees. He submitted that any order passed by the Master as a delegate would tantamount to an order by the Court and against such an order, no appeal or revision is permissible under law. He submitted that the word "appeal" used in Order XIV Rule 12 of O.S. Rules is clearly a misnomer and power is actually in the nature of a review of the order passed by the Master. Therefore, according to the learned counsel, the bar under Section 100A of the Code of Civil Procedure is not attracted to the present case.

5. In order to answer the issue of maintainability of appeals it would be necessary to refer to the relevant provisions of Madras High Court O.S.Rules and the Code of Civil Procedure. Order I Rule 4 of the O.S.Rules contains definitions, and Clause (3) thereof provides that the term "Court"include a Judge, or Master, or First Assistant Registrar, original side. By virtue of Order XIV Rule 10 (xxix) all applications for or relating to an order for transmission or for the execution of a decree or order of arrest, attachment, sale or otherwise shall be made to the Master. Order XIV Rule 12 of the O.S. Rules provides that any person affected by any order of the Master (except Court-fees) , in respect of all matters judicially dealt with in exercise of the powers delegated to him by the Chief Justice from time to time may appeal therefrom to a Judge. Order XXX, Rule 3 of O.S. Rules provides that all acts directed or permitted to be done by these Rules, or orders passed by the Registrar, Master or Taxing Officer shall be deemed to be judicial, quasi judicial or non judicial acts, as the case may be, within the meaning of Section 128 (2)(i) of the Code of Civil Procedure. Section 128 of the Code of Civil Procedure inter-alia enumerates matters in respect of which Rules can be framed by the High Court. Clause (i) of sub rule 2 of Section 128 of the Code of Civil Procedure provides for delegation to any Registrar, Prothonotary or Master or other official of the Court of any judicial, quasi-judicial and non-judicial duties.

6. On a plain reading of the relevant O.S. Rules in conjunction with Section 128 of the Code of Civil Procedure, it is clear that the Master deals with these matters in exercise of the powers delegated to him under the O.S. Rules. It is well settled that where a statute itself has authorised the power to be conferred upon a specific authority, the status of delegate is that of an agent (See Huth Vs. Clarke (1890) 25 QBD 391). It is equally well settled that when an authority delegates its power, it does not completely divest itself of its power but is, in the absence of any statutory bar, capable of resuming it and, unless that is precluded by the terms of the delegation, even exercising concurrent powers. Thus, in Godhavari Vs. State of Maharashtra, [(1966) 3 S.C.R. 314], the Supreme Court held that after delegating its power under Section 30 of the Defence of India Rules to the District Magistrate, the State Government is still

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competent to make an order of detention itself. As a necessary corollary, since an agent has no independent power, but exercises the powers given to him by his principal, an act done by a delegate is nothing but the act of the principal. Therefore, if an appeal or revisional power is vested in the delegator, to control its subordinates, the delegator cannot entertain an appeal or revision against the decision of its delegate, because the act of the delegate is that of the delegator and an authority cannot hear an appeal or revision against an order made by itself.

7. In Roop Chand Vs. State of Punjab, [1963 (1) Supp. SCR 539], the Constitution Bench considered the issue as to whether the State can hear the appeal against the order of the Officer passed by him in exercise of his delegated power. In that case, the Consolidation Officer decided against the petitioner, against which, the petitioner filed an appeal before the Settlement Officer, but the appeal failed. Against this, the petitioner filed an appeal before the State Government under Section 21(4) of the E.P.Holdings (Consolidation and Prevention of Fragmentation) Act, 1948, which was heard by the Assistant Director, Consolidation, to whom the power to hear such appeals had been delegated under Section 41(1). The Assistant Director allowed the appeal and the petitioner became entitled to retain certain plots. Respondent No.2 to whom these plots had been given on repartition moved the State Government under Section 42 to revise the order of the Assistant Director and the State Government set aside the order of the Assistant Director and restored that of the Consolidation Officer. The petitioner filed a writ petition in the Supreme Court challenging the order of the State Government contending that under Section 42, it could not interfere with an order made by itself or by an officer exercising powers of the Government delegated to him under Section 41(1). The Court held that where the State Government delegated its power to hear appeals under Section 21(4) to an Officer, an order passed by such an Officer is an order passed by the State Government itself, because the power to hear the appeals is vested by the statute in the State Government and no one else. The result would be that since no one can interfere with his own order in revision, an order passed by the State Government in revision under Section 42 over the order of its delegate would be a nullity. The Court held that Section 42 did not empower the State Government to interfere with an order passed by the Officer to whom the power to hear the appeals filed under Section 21(4) had been delegated by it under Section 41(1). The words "any order passed ..... by an officer under this Act", in Section 42 did not include an order passed by an Officer in exercise of powers delegated to him by the State Government under Section 41(1).

8. Applying the same logic, this Court cannot exercise the power of appeal or revision against the order of the Master, which is passed by him in the capacity as a delegate of the High Court. It is well settled that ordinarily an appeal would lie from a lower Authority to the higher Authority and an order passed by the delegate is in exercise of powers given by the delegator and such an order is not appelable or revisable. Therefore, we are inclined to accept the contention of the learned Senior Counsel Mr.Yashod Vardhan that the word appeal in Order XIV Rule 12 is a misnomer, but it is actually a power of review of this Court. Therefore, such an order passed by the

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Master is not appealable or revisable by the learned Judge under Rule 12. The power conferred under Rule 12 is really in the nature of power of revision. Consequently, the bar under Section 100A of the Code of Civil Procedure is not attracted and the appeals are perfectly maintainable.

9. Coming to the merits of the case, Mr.Yashod Vardhan invited our attention to the provisions contained in Section 51 and Order XXI Rules 37 to 40 of the Code of Civil Procedure. He submitted that the Master passed an order of arrest originally on 07.11.2001, but that order has not been executed for nearly 5 years and it is only on 16.06.2006 warrant of arrest has been re-issued by the Master on the request of the decree holder. The contention of Mr.Yashod Vardhan is that an order of arrest and detention in civil prison of the judgment debtor in a money decree can be passed by a Court, only in strict compliance of the provisions contained in Section 51 of the Code of Civil Procedure and the requirement as to the opportunity contemplated to be given to the judgment debtor as to why he should not be detained in civil prison and the reasons to be recorded in writing by the Court as to its satisfaction with regard to the several matters mentioned in the provisio to Section 51 have to the fulfilled every time an order for arrest and detention in civil prison is made. In support of his contention, the learned counsel relied upon the decision of this Court in K.Venkatasubba Rao Vs. M.Sreeramulu, AIR 1949 Mad. 470 wherein it was observed as follows:

> "It was urged by the learned counsel for the respondent that this judgment debtor was on a former occasion, ordered to be arrested and that full reasons were then given for his arrest and that the lower Court had omitted to give the reasons now because of that. That order for arrest was not taken advantage of or carried out. This is a fresh application made months later. My view is that reasons must be given every time a man is ordered to be arrested and in every proceeding where he is ordered to be arrested, even if it is on the same day: for, cases differ and much depends on lapse of time also."

10. The learned Senior Counsel Mr.Yashod Vardhan also placed reliance on the decision of the Delhi High Court in Gopichand Vs. Smt.Brahmo Devi, AIR 1968 Delhi 101, wherein the Court held that when the order for arrest and detention in prison was not given effect to and subsequent application made after a long interval for passing fresh order, the Court must give opportunity to judgment debtor to show cause and must be satisfied with the conditions mentioned in proviso are fulfilled at time when it is called upon to make subsequent order. It was further held that such opportunity need not, however, be given nor is it necessary for the Court to record reasons in writing as to its satisfaction about the fulfilment of conditions contained in the proviso where interval between first order and subsequent order is short.

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11. Mr.Yashod Vardhan also brought to our notice a decision of the Supreme Court in J.G.Verghese Vs. The Bank of Cochin, [(1980) 2 SCR 913]. In that case the appellants were the judgment debtors while the respondent-bank was the decree holder. In execution of the decree a warrant for arrest and detention in civil prison was issued to the appellants under Section 51 and Order XXI Rule 37 of the Code of Civil Procedure. On an earlier occasion there had been a similar warrant for arrest in execution of the same decree. The decree holders also proceeded against the properties of the judgment debtors and in consequence all their immovable properties had been attached for the purpose of sale in discharge of the decree debts. A receiver was appointed by the execution court to manage the properties under attachment. Even so, the court had issued a warrant for the arrest of the judgment debtors because on an earlier occasion a similar warrant had already been issued without any investigation as regards the current ability of the judgment debtors to clear off the debts or their mala fide refusal, if any, to discharge the debts. Allowing the appeal the Supreme Court held that -

> "(1) the words in Section 51 which hurt are 'or has had since the date of the decree the means to pay the amount of the decree'. Superficially read this implies that if at any time after the passing of an old decree the judgment debtor had come by some resources and had not discharged the decree he could be detained in prison even though at that later point of time he was found to be penniless. This is not a sound position, apart from being inhuman going by the standards of Article 11 of the International Covenant on Civil and Political Rights and Article 21. A simple default to discharge is not enough. There must be some element of bad faith beyond mere indifference to pay, some deliberate or recusant disposition in the past or alternatively current means to pay the decree or a substantial part of it. The provision emphasises the need to establish not mere omission to pay but an attitude of refusal on demand verging on dishonest disowning of the obligation under the decree. Considerations of the debtor's other pressing needs and straitened circumstances will play prominently.
>
> (2) Unless there be some other vice or men rea apart from failure to foot the decree, international law frowns on holding the debtor's person in civil prison, as hostage by the court. India is now a signatory to this Covenant and Article 51(c) of the Constitution obligates the State to 'foster respect for international law and treaty obligations in the dealings of organised peoples with one another'. Even so, until the Municipal Law is changed to accommodate the Covenant what binds the courts is the former not the latter."

12. We are inclined to agree with the submission of Mr.Yashod Vardhan as the object of detaining a judgment debtor in a civil prison is not to punish him for any crime committed by him, but for enabling the decree holder to realise the money decreed in his favour and for the purpose of achieving this object, alone, the conditions

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in the proviso to Section 51 have been formulated. The statute contemplates sending to prison the judgment debtor who refuses or neglects to pay towards decree something which the Court has found after hearing him to be within his means to pay. It is not mere omission to pay but an attitude of refusal on demand verging on dishonest disowning of the obligation under the decree which is essential. Though at a particular point of time the conditions mentioned in the proviso to Section 51 of the Code might have been satisfied, but if that order was not taken advantage of or not given effect to within a reasonable time, the position of the judgment debtor may so change that the conditions mentioned in the proviso to Section 51 of the Code are no longer satisfied. Therefore, though we do not share the view that every time an order for arrest and detention in civil prison of a judgment debtor is made by a Court whether the interval between one order and a subsequent order is long or short, the Court must give an opportunity to the judgment debtor and give reasons in writing as to the satisfaction about the fulfilment of the conditions contained in the proviso to Section 51 of the Code, if there had been a sufficiently long interval between the original order which has not been given effect to and a subsequent application for passing a fresh order, the Court must give an opportunity to the judgment debtor to show cause and must be satisfied that the conditions mentioned in the proviso to Section 51 of the Code are fulfilled at the time when the Court is called upon to make the subsequent order. In the case on hand, undoubtedly, there has been sufficiently long interval between the original order and the subsequent order, warranting a fresh examination of the position of the judgment debtor with reference to the conditions mentioned in the proviso to Section 51 of the Code. Therefore, we allow these appeals and remand the matter to the Master with a direction to dispose of the matter afresh in the light of this judgment, within a period of eight weeks from today. It is open to the parties to let in evidence before the Master in respect of means as well as other issues.

ssa/sm

Sd/
Asst.Registrar

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Sub Asst.Registrar

To

1. The Sub Assistant Registrar,
Original Side,
High Court, Madras.

2. The Master,
High Court, Madras.

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+ 1 cc to Mr. A. V. K. Ezhilmani, Advocate SR No. 41443

+ 1 cc to Mr. B.T. Seshadri, Advocate SR No. 41765

NG(CO)
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